



BSkyB v EDS

Technology and outsourcing - March 2010

Lulu and the failed IT project

Mr Justice Ramsey issued his long awaited decision in this case on 26 January 2010. He found EDS liable to Sky in respect of:

- **one claim of fraudulent misrepresentation,**
- **one claim in respect of negligent misrepresentation; and**
- **breach of contract**

The case concerned Sky's procurement of a new CRM system for its two call centres based in Scotland. EDS was selected ahead of PWC to provide the solution, based in large part on certain representations made by EDS.

Sky was keen that EDS start work at an early date and so a Letter of Intent was entered into, pending negotiation of a Prime Contract. When the project ran into trouble a settlement agreement of past claims was concluded and subsequently a Memorandum was negotiated when Sky decided to take the project back in-house, but retain EDS as supplier.

By all measures, the project went badly wrong. It had originally been intended to go live in July 2001, but was not finally completed until March 2006. The original cost estimate for the project was £47 million, but the final bill came to £265 million.

Some of the facts of the case were unique. EDS' bid manager at the time, Joe Galloway, "the mastermind for EDS' response" was said by the judge to have "demonstrated an astounding ability to be dishonest". He was shown early on in the hearing to have lied on oath as to his qualifications, which he bought from a non-existent university in the Caribbean. Sky's leading counsel obtained a similar degree (with better marks) in the name of his dog, Lulu.

Misrepresentation and breach of contract

Crucially for Sky, Ramsey J found that EDS had made both a fraudulent and negligent misrepresentation that it had carried out a proper analysis of the time required to complete the project. Sky had made it clear that time was a crucial factor to it. But EDS proffered timescales which they believed Sky wanted to hear, without having any reasonable basis for doing so.

Since Sky succeeded on one of their claims for fraudulent misrepresentation, they are guaranteed substantial damages which are not restricted by the cap on liability set out in the contract (£30 million). We understand that in an interim award, the judge has already ordered EDS to pay £200 million.

Sky also succeeded in proving breach of contract by EDS, but failed on the facts to demonstrate that the breach effectively amounted to a repudiation of the contract by EDS.

Significance of the judgement

Some commentators have suggested that the judgement has limited application, that its facts are unique because it revolved around the dishonest behaviour of one EDS employee, Joe Galloway.

We believe such an approach is simplistic and misplaced for a number of reasons:

- the judgement provides one of the few occasions where a complex technology project and its associated documentation was carefully reviewed and dissected by the Court;
- in large scale or high risk projects, a claim for fraud will now be attractive because of the ability to avoid the cap on liability. This case demonstrates that although such a claim is more difficult to bring, the benefits of success are substantial and are achievable. It is probably good practice for in-house lawyers to now review high risk or high value bid documents;

- the case also looked at the wording of:
 - i) entire agreement clauses. In the case of the former, merely providing that the agreement “supersedes” all prior representations will not exclude the possibility of a claim for misrepresentation. Very clear non reliance wording is required to achieve this.
 - ii) exclusions of indirect loss. Separate clauses which refer to (a) indirect losses; and (b) loss of profit, anticipated savings etc are not intended to be read *eiusdem generis*. Because the clauses were separated out, the exclusion of loss of profits could not be read as applying only to indirect loss of profit.
- the case considered a settlement provision in the Letter Agreement which related to “all known... and unknown claims”. Such a clause should only be read as settling claims which were within the contemplation of the parties at the time of the settlement and did not, for example, exclude the possibility of a claim for fraudulent misrepresentation. In respect of the giving up of claims, general catch-all wording may not necessarily function in the manner intended;
- the judgement also involved analysis of the steps that a bidder is expected to have completed in order not to risk a subsequent claim for misrepresentation. By way of example, there was some discussion as to the level of resource planning a supplier should have completed at different stages of the project if it states in its bid that it has the resources necessary to complete the project;
- the judgement looked at the status of communications between the different levels within the organisations as to the progress of the project. While project managers at both organisations were aware of and discussed realistic roll out dates, the fact that at a more senior level different, more optimistic dates were being given was crucial in finding that EDS had misrepresented the dates that were achievable. EDS was not able to escape liability on the basis that most people within each organisation were aware of the more realistic dates; and
- a trap for the unwary supplier was also highlighted; where a bid is made to a group of companies without specifying which company within the group the bid is made, liability in tort could arise for any negligent or fraudulent misstatements made to the wider group. Bid responses should therefore be directed at a particular group member.

All in all, there is a lot to think about in this judgement. EDS was subsequently acquired by HP, who it is understood is appealing the judgement. It is likely therefore that we have not heard the last of this case.

More information

Because of the significance of this judgement, Morgan Cole has prepared a more detailed briefing note with Key Learning Points highlighted. Please contact Justin Harrington if you would like to receive this.



Justin Harrington, Partner

T: 029 2038 5526

E: justin.harrington@morgan-cole.com

This publication is © Morgan Cole and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.